American Armored Car, Ltd. *and* United Federation of Security Officers, Inc. Case 2–CA–33316

July 19, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On April 13, 2004, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Armored Car, Ltd., New York, New York, its officers, agents, successors, and assigns, shall pay to Fernando Miranda the sum of $68,061.02, plus interest and minus tax withholdings required by the Federal and State laws, and shall reimburse Fernando Miranda the sum of $10,127.25 for medical expenses incurred during the backpay period. The total amount the Respondent is required to pay is $78,188.27.

Dated, Washington, D.C. July 19, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings, we find that the Respondent has failed to meet its burden of proof with respect to any of its contentions regarding the amounts owed to the discriminatee.

Mindy Landow, Esq., for the General Counsel.
James J. Cusack, Esq., for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City, New York, on January 27, 2004. This is a supplemental hearing to determine the backpay of Fernando Miranda for the loss of any earnings he suffered as a result of his discharge on September 27, 2000.

The Board issued its decision in the underlying case on July 11, 2003 at 339 NLRB No. 81. In that case, the Board ordered the Respondent to reinstate and make whole Fernando Miranda.

On October 27, 2003, Region 2 issued a compliance specification and notice of hearing. This alleged that the period for which backpay is owed to Miranda runs from September 27, 2000, the date of his unlawful discharge, until July 29, 2003, date upon which the Respondent made him a valid offer of reinstatement.

In her brief, the General Counsel moved to amend the specification to take into account Miranda's testimony that he had significant interim earnings during the first, second, and fourth quarters of 2001. She noted that Miranda failed to accurately report such earnings to the Regional Office during the investigation. Therefore, the General Counsel conceded that he should be denied backpay, but only for these periods of time. I hereby grant this amendment as it is in accordance with the Board's decisions in *American Navigation*, 268 NLRB 426 (1983), and *Ad Art*, 280 NLRB 985 fn. 2 (1986), and I hereby grant that Motion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS AND CONCLUSIONS

The backpay period runs from September 27, 2000, the date of Miranda's discharge, until July 29, 2003, which is the date that the Respondent made a valid offer of reinstatement. The compliance officer for the Region, testified that she computed his weekly hours and wages based on a projection of his past weekly earnings.

The compliance officer proposed that during each calendar quarter during the backpay period, Miranda, based on his predischarge work experience, would have worked 12 hours of overtime per week. Also, based on his past experience, she proposed that Miranda would likely have received a $1 per hour wage increase in each year.

With respect to the use of various backpay formulas, the Board does not need to obtain a perfect calculation; but needs only to use a reasonable formula that would have a probability of determining the lost earnings of discriminates. In *NLRB v.*

Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963), the Court stated inter alia:

> Obviously, in many cases it is difficult for the Board to determine precisely the amount of back pay, which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations . . . . We have held that with respect to the formula for arriving at back pay rates or amounts which the Board may deem necessary to devise in a particular situation, "our inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved." [Case citations omitted.]

The compliance officer testified that during her investigation, the Employer indicated that it would not be possible to provide the payroll records for a representative sample of other employees who worked during the backpay period. She also testified that the records for one employee that were furnished by the Employer, were not useful because these records indicated that the purported "exemplar," unlike Miranda, had neither gotten past raises, nor had equivalent overtime hours. Based on her credited testimony, I conclude that the backpay formula chosen by the General Counsel was reasonable and it is accepted. *Weldun International, Inc*., 340 NLRB No. 79.

Further, the compliance officer correctly included the amount of medical expenses that were incurred by Miranda during the backpay period as these would have been covered by the Respondent had he continued to be employed and covered by the Respondent's medical insurance plan. The fact that Miranda may not have actually paid some of the medical bills does not obviate the Respondent's obligation, as Miranda's liability for those expenses has not been shown to be extinguished or waived by the health care providers. *Regional Import & Export Trucking Co.*, 318 NLRB 816, 825 (1995).[1]

Soon after Miranda was discharged by the Respondent, he had to undergo two operations. These took place in September and November 2000. He therefore was not available for work for a period of time.

Miranda testified that after recuperating, he unsuccessfully sought work, in early 2001, at a number of armored car companies such as Brinks, Hudson Armor, and Loomis Fargo. He also testified that he sought work at the Mount Vernon Money Center as well as other employers, such as Poland Spring. At the latter company, Miranda testified that he was told that the Respondent had given him a poor reference and said that he had been trying to start up a union.

The Respondent asserts that Miranda's job search was insufficient because sometime in 2001, his license had again been suspended and therefore his search for driving jobs was doomed to failure. Miranda, while employed by the Respondent, had his license suspended because of his failure to pay child support. But his license had been reinstated when a garnishment arrangement was made. Given his past experience, Miranda could reasonably have expected that he could do the same thing if he got another job that involved driving. Moreover, the resuspension of Miranda's license was the direct result of his unlawful discharge by the Respondent, inasmuch as the garnishment arrangement no longer was in effect. And without a paycheck, Miranda no longer could keep up his child support payments.

Miranda's first job after his discharge was acquired in March 2001, when he was hired as a school bus driver by White Plains Bus Company. He worked at this job for about 3 weeks but when told that he would be laid off in the upcoming slow season, he resigned and decided to seek employment in Florida where he enlisted the aid of a cousin in his search for work.

While in Florida, Miranda managed to get a temporary job as a guard for International Security & Investigations, where he earned about $800. (However, he incurred travel expenses of $160.) After that job, he returned to New York. His efforts to gain employment at this time were unsuccessful.[2]

From September 30 to November 14, 2001, Miranda again worked for White Plains Bus Company and earned $2,585.78. After that, he could not find other employment.

Miranda moved back to Florida in July 2002, and sought work there. He ultimately obtained a job with Sea World in October 2002, and was paid $6.45 per hour. Thereafter, he received a raise to $7 per hour. He continued to work at that job for the remainder of the backpay period.

The Respondent presented a witness who testified, in substance, that there were plenty of jobs available in the armored car industry during the backpay period. That may be so. But it certainly didn't help Miranda and I credit his testimony to the effect that he was denied employment at jobs for which he applied.

The Respondent produced another witness who testified that as far as his company's records showed, Miranda, contrary to his testimony, did not file an employment application. But this testimony was not particularly dispositive as the witness conceded that employment applications are normally destroyed after 1 year.

In short, I conclude that the Respondent has not carried its burden of proof that Miranda did not make an adequate search of work during the backpay period. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966); *McLoughlin Mfg. Corp.*, 219 NLRB 920, 922 (1975); *Isaac and Vinson*

[1] The Respondent contends that Miranda could have obtained medical coverage under Medicaid. It may be that he might have been eligible for such coverage, but Miranda was not aware that he could apply. As such, his theoretical entitlement to governmental assistance for medical payments, does not serve to lessen the liabilities that he actually incurred by virtue of his illegal discharge by the Respondent. Further the other contentions made by the Respondent regarding Miranda's liability for medical services incurred during the backpay period are, in my opinion, hypothetical and unsupported by hard evidence.

[2] As a volunteer in the National Guard, Miranda was called up for service for 3 days after September 11, 2001, and received a total of $300. That amount was included in his interim earnings for the quarter in question.

Security Services, 208 NLRB 47, 52 (1973); *Champa Linen Service Co.*, 222 NLRB 940, 942 (1976).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, American Armored Car, Ltd., its officers, agents, successors, and assigns, shall

1. Make payment to Fernando Miranda, the sum of $68,061.02 plus interest, less tax withholding required by Federal and State laws.

2. Reimburse Fernando Miranda the sum of $10,127.25, which is the amount he owes for medical expenses incurred during the backpay period.

Dated, Washington, D.C. April 13, 2004